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No. 607

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

THE DAILY PRESS, INC.,
Petitioner,
-v-
UNITED PRESS INTERNATIONAL,
THE EVENING NEWS
ASSOCIATION and
KNIGHT NEWSPAPERS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Brief of Respondent Knight Newspapers, Inc., in Opposition

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THE INLAND PRESS, DETROIT, MICHIGAN

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This brief is for Respondent, Knight Newspapers, Inc., (Knight) owner and publisher of Detroit Free Press (Free Press) in opposition to the Petition of The Daily Press, Inc. (Daily Press). United Press International is here termed "UPI" and the Evening News Association and its newspaper, The Detroit News, are here termed "News".

QUESTION PRESENTED

The questions presented by Petitioner (Pet. 2) are unacceptable to Knight. They disregard the express findings of the Courts below based upon uncontraverted facts. The only question presented as to Knight is:

Where Petitioner failed to support its allegations of

anti-trust conspiracy against Respondent Knight with any significant probative evidence framing a genuine issue for trial, and where Knight supported its denial of the alleged conspiracy with uncontraverted facts which are irreconcilable with and diametrically opposed to the existence of any anti-trust conspiracy, was summary judgment properly granted for Knight?

The Trial Court granted summary judgment for Knight and the Court of Appeals affirmed.

COUNTER STATEMENT

The agreement between UPI and Knight dated August 13, 1955, and continuously in effect thereafter, reads in part:

> "Fifth. It is mutually agreed that United Press reserves the right to make working arrangements and exchanges of news and wire facilities with other press associations, publishers or persons and to sell said news report to any other party or parties." (57a)[1]

Because of a strike, publication of both the Free Press and the News was suspended continuously from July 13, 1964 (7a and 8a), until on or about November 24, 1964 (21a).

Beginning July 22, 1964, and thereafter during the period of the strike Petitioner published a newspaper called the Detroit Daily Press (6a). It was an interim newspaper, publication of which was to be (and actually was) discontinued upon termination of the strike (90a-91a, 93a-94a, 99a).

In the latter part of July, 1964, Petitioner sought an arrangement whereby it might secure news wire service from UPI (59a-64a).

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[1]References to "(a)" are to pages in the Joint Appendix in the Court of Appeals.

Petitioner had the impression (an erroneous one) that the approval of both the News and Knight was required before it could secure the wire service from UPI "on a contract dissimilar from theirs" (77a, 78a, 80a, 198a-199a).

Michael Dworkin, President and chief operating executive of Petitioner and editor and publisher of its newspaper (59a) suggested, on July 20, 1964 (61a, 101a) contacting Lee Hills and someone at the News (61a).

On July 20, 1964, Petitioner, through Frank Gill, its Executive Editor, contacted (91a, 101a) Hills (Executive Editor and Publisher of The Free Press and its chief executive officer, 100a-101a) and also Harvey W. Patton (Managing Editor of the News, 131a) to secure that approval, if required, from Knight and the News (87a-90a).

When Gill telephoned Patton, Patton replied:

> "So far as the News is concerned this is a matter which concerns only you and United Press International. We want to have nothing to do with it. We don't want to be connected with you or your negotiations with United Press in any way whatsoever. If they want to sell you the service that is their business. We want no part of it." (62a)

That evening (July 20, 1964) Gill telephoned Hills at home. Hills said that the position of the Free Press would most probably be the same as the News, but before giving a definite commitment he wanted to have an opportunity to read over at his office the Free Press contract with UPI (62a-63a). The following day (July 21, 1964) Hills told Gill that the "position of the Detroit Free Press is the same as the position of the News" (63a).

In the same telephone conversation Hills volunteered:

> "Here is Mims Thomason's number in New York. You can get him direct." (92a)

Thomason is President and General Manager, chief ex-

ecutive officer and a director of UPI (119a-120a).

Gill then telephoned Thomason in New York on July 21, 1964, to talk about obtaining wire services (90a-93a).

Then and thereafter negotiations were solely between UPI and Petitioner (none of which involved either Knight or the News).

The negotiations failed to produce an agreement between UPI and Petitioner (76a, 78a, 83a).

Upon termination of the strike the interim newspaper ceased publication (6a, 16a, 21a).

This suit was begun on November 20, 1964 (1a), prior to resumption of publication of the Free Press by Knight on Tuesday, November 24, 1964 (21a), and resumption of publication of the News on November 25, 1964 (21a).

The summary judgment granted to Knight was affrmed by the Court of Appeals. *Daily Press, Inc.* v. *United Press International,* 412 F. 2d 126 (6th Cir. 1969).

REASONS FOR DENYING THE WRIT

A.

Respondent Knight replies only to Petitioner's reason number 2 (Pet. 16-17) for granting the writ because the other reasons neither involve nor refer to it.

There is no genuine issue of fact respecting Petitioner's charges against Knight.

There is no evidence upon which there could be found any illegal actions or illegal activities involving Knight, singly or jointly with the other Respondents or either of them.

Respondents deposed all of Petitioner's five principals, plus two additional employees, all of whom testified that neither they nor anyone they knew had any information upon which to base the charges made in Petitioner's complaint against Knight.

The Petitioner agrees. After saying:

> ". . . plaintiff alleged that the three defendants engaged in an unlawful combination designed to restrict wire services from new newspapers in violation of Section 1." (Pet. 16)

—the Petitioner admits:

> "At no point did plaintiff seek to prove a formal agreement among the defendants." (Pet. 16).

In its opinion the Court of Appeals said:

> "Plaintiff did not claim that there was any direct proof of any agreement, combination or arrangement on the part of the defendants to deprive plaintiff of wire services; neither do we find any circumstantial evidence from which inferences could properly be drawn, even tending to establish an agreement." (412 F. 2d, at 133)

B.

The Petitioner says (Pet. 16):

> "Both the District Court and the Court of Appeals made much of the fact that plaintiff's witnesses were unable to testify to direct acts of conspiracy."

The limitation to "plaintiff's witnesses" must be inadvertent. The impression made is that only "plaintiff's witnesses" were examined. This is an unfortunate distortion.

Petitioner deposed various witnesses who are principals of Respondents:

Lee Hills (of Knight, Vice President, [now President] a Director, Executive Editor and publisher of Detroit Free Press and the person responsible for all phases of that newspaper) (54a)

Alan Mims Thomason (of UPI, President, General Manager and a Director) (54a)

Dale M. Johns (of UPI, an employee, Central Division Manager and the person in charge of news and

picture coverage and sales and service activities for that Division) (54a)

Peter B. Clark (of News, President, a Director, stockholder, Publisher of the newspaper Detroit News, and Chief Executive Officer) (55a)

and

Harvey W. Patton (of News, Managing Editor prior to January 1, 1965, of the newspaper Detroit News, and editorial writer, paragrapher and book critic with title of Associate Editor since January 1, 1965) (55a)

All of the witnesses related to the several Respondents denied the charges made in the Complaint.

It is not startling "that plaintiff's witnesses were unable to testify to direct acts of conspiracy" (Pet. 16) because there was no conspiracy of any nature.

The Court of Appeals found:

> "In their depositions the knowledgeable officers and employees of plaintiff were interrogated on this subject, and none of them knew of any activities of defendants which were directed at preventing plaintiff from obtaining wire services. On the contrary, the sworn testimony of Harvey W. Patton and Peter B. Clark of the News, and of Lee Hills of the Free Press, was clear that they did nothing to interfere with plaintiff's acquisition of wire service from UPI. Lee Hills went even further. He tried to help plaintiff obtain such service. There was no proof of any discussion between the News and the Free Press concerning UPI's furnishing wire service to plaintiff. The District Court properly characterized plaintiff's proof as follows:
>
> > '[P]laintiff's case is supported by inference drawn from inference based upon inference,

> supported by facts which are in themselves mere conclusions, and inferences drawn from other facts.'
>
> There was not an iota of proof that either the News or the Free Press induced UPI not to sell its wire services to plaintiff. There was no proof of any conspiracy.'' (412 F. 2d, at 133)

The findings immediately above were made after the Court of Appeals said:

> ''Lee Hills told Frank Gill that the position of the Free Press was the same as that of the News. Gill testified that Hills told him: 'We see no reason to stop you.' Hills testified that he told Gill:
>
> > 'We have no objections at all and have no reason to object to such a newspaper as you are talking about buying United Press International.'
>
> Hills gave Gill the private telephone number in New York of Mr. Mims Thomason, President of UPI, so that Gill could contact him about obtaining service.
>
> Mims Thomason testified that Lee Hills had telephoned him to advise that Professor Frank Gill of Wayne State University, who was associated with Daily Press, had called him (Hills) to inquire concerning the purchase of UPI news service; that Hills had referred Gill to Thomason; and that Thomason would be hearing from him. Thomason further testified that Hills told him:
>
> > '***[A]s far as the Free Press was concerned, they had no objection at all, of course, to our selling the Detroit Daily Press.'
>
> Thomason was of the impression that Hills wanted UPI to sell its services to the Daily Press.'' (412 F. 2d at 130).

All witnesses deposed by Petitioner as well as all witnesses examined by the several Respondents are in accord:

Knight was not a party to any of the charges made against it in the Complaint.

C.

Petitioner says (Pet. 16):

> "2. In addition to its claim that UPI had unilaterally violated Section 2 of the Sherman Act, plaintiff alleged that the three defendants engaged in an unlawful combination designed to restrict wire services from new newspapers, in violation of Section 1."

The revelation of the asserted "unlawful combination" never materializes and none is possible because:

(a) Knight's intent was to aid Petitioner through Hills by the latter's telephone introduction of Gill to Thomason, the President and General Manager of UPI.

(b) Knight's motive was plainly not mischievous. The motive was understood by Thomason to be in Petitioner's favor. He testified:

> "If anything, I think he (Lee Hills) was encouraging me to sell the service to the Detroit Daily Press." (124a)

Knight's imposed involvement was due solely to Petitioner's request for information and help. When Gill asked for aid in procuring the wire service (103a) from UPI, Hills responded by volunteering (92a) to supply to the latter the private (121a) telephone number of Thomason in New York and paving the way for Petitioner, through Gill, to negotiate for the service (103a-104a).

Petitioner never informed the Courts below and it does not reveal to this Court the reasoning by which it intends to convert the aid and assistance it received from Knight into an anti-trust conspiracy against it.

There is no genuine issue for trial. The charges of anti-trust conspiracy against Knight are in a shambles

and completely routed by all of the witnesses for Petitioner and for Respondents.

Knight's actions with respect to Petitioner were either requested by it or volunteered by Knight for the Petitioner's benefit. Knight could do no more than it did for Petitioner.

The Court of Appeals was clearly right in applying *First National Bank of Arizona* v. *Cities Service Co.*, 391 U. S. 253, (1968) where this Court said:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an anti-trust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." (391 U.S., at 290)

In the instant case there is neither room for further proof of the fact of an alleged conspiracy, as in *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700 (1969), nor for the development either as a matter of fact or of law of an anti-trust liability based upon the unilateral activities of Knight, as in *Albrecht* v. *Herald Co.*, 390 U. S. 145 (1968), and *Fortner Enterprises* v. *U. S. Steel Corp.*, 394 U. S. 495 (1969).

The reliance of the Petitioner on the three cited cases is misplaced because there is here none of the factors on which those decisions are based. The decision of this Court in *Cities Service*, supra, is dispositive of the issues involving Knight.

CONCLUSION

For the reasons stated, the Petition for a writ of certiorari should be denied.

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